No. 17535

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLIN G. BLACKWELL, WARDEN,
UNITED STATES PENITENTIARY,
ALCATRAZ, CALIFORNIA,

Appellant,

v.

EDWARD C. EDWARDS,

Appellee.

BRIEF FOR APPELLEE

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

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JURISDICTION

Appellee, while confined at Alcatraz, California, and serving sentences aggregating eleven years [illegible] imposed by United States [illegible], on [illegible]

filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. On June 16, 1961, an order was entered whereby Appellee was ordered released from confinement and returned to the custody of the United States Army. The jurisdiction of the court below rests on 28 U. S. C. § 2241.

On August 15, 1961, a Notice of Appeal was filed. That notice appears to be timely. Rules of Civil Procedure, Rule 73 (a). The jurisdiction of this Court rests on 28 U. S. C. § 1291.

STATEMENT OF THE CASE

Appellant's statement of the case contained in his brief appears adequate.

SUMMARY OF ARGUMENT

Appellant argues two basic questions: (1) Is the good time of Appellee, a military prisoner in a Federal civil penal institution, to be computed under general statutory rules applicable to civilian prisoners or under military regulations? (2) If military regulations apply, is the good time rate measured on the basis of 10 days per month of sentence or on the basis of 14 8 days per month of time spent in actual confinement?

Appellee's position is that the court below properly held that military regulations apply, based on the specific language contained in those regulations, and that the cases cited by Appellant refer to a different rule prevailing under earlier and differing regulations.

On the second question Appellee contends that there are two rates potentially applicable: one measured prospectively by sentence imposed, the other measured by time actually served. The latter results in the sooner release of Appellee and was properly applied by the court below since there is no limitation on its applicability; this rate does not apply solely to ascertaining forfeitures of good time. In any event, if there is an ambiguity in the regulations, it should be construed in favor of Appellee since his liberty is at stake. Since the applicable regulation clearly specifies the lesser rate based unqualifiedly on time spent in confinement, and that rate was properly applied by the court below.

ARGUMENT

I. The Computation of Good Conduct Time for Persons Serving Sentences Imposed by United States Army Courts-Martial is Governed by the Provisions of Applicable Army Regulations

The court below held that the computation of good conduct time of Appellee is governed by Army Regulations No. 633-30 rather than the general statutory rate applicable to civilian prisoners generally and contained in 18 U. S. C. § 4161.

Regulations issued by the Secretary of the Army are authorized by 5 U. S. C. § 22 (which is the enabling statute for departmental regulations to be issued by the head of each respective department) and specifically with respect to the execution of confinement by Art. 58, Uniform Code of Military Justice, 10 U. S. C. § 858 (a).

As this Court held in an appeal from an earlier application for a writ of habeas corpus by this same Appellee in Edwards v. Madigan, 281 F. 2d 73, 77 (CA 9th, 1960):

> "The Secretary of the Army has statutory authority to issue regulations (5 U. S. C. A. § 22), and they are presumptively valid unless arbitrary and unreasonable, or 'plainly and palpably inconsistent with law.' Boske v. Comingore, 1900, 177 U. S. 459, 470, 20 S. Ct. 701, 706, 44 L. Ed. 846; Carter v. Forrestal, 1949, 85 U. S. App. D. C. 53, 175 F. 2d 364; United States v. Obermeier, 2 Cir., 1950, 186 F. 2d 243. The burden is on the one attacking the regulation to show its invalidity. Maryland Casualty Co. v. United States, 1920, 251 U. S. 342, 40 S. Ct. 155, 64 L. Ed. 297; Montana Eastern Limited v. United States, 9 Cir., 1938, 95 F. 2d 897; United States v. Obermeier, supra."

The regulations covering the apprehension and confinement of persons subject to the Uniform Code of Military Justice adopted by the Secretary of the Army are Army Regulations No. 633-30 which expressly provide as follows:

> "These regulations prescribe procedures for the computation of sentences to confinement of persons subject to the Uniform Code of Military Justice serving sentences in the custody of the Department of the Army." (Section 1 a)

Turning to the specific provision of these regulations applicable to the computation of good conduct time, we find the following specific provision:

> "The rate of earning abatement of sentence for good conduct is the same for prisoners confined in military and Federal penal or correctional institutions." Section 6 c (2) (a), page 8.

Thus, the effect of the foregoing provisions is to say that the rate shall be computed in accordance with the military rates specified. The foregoing provision is expressly made applicable to sentences adjudged on or after 31 May 1951, which applies to Appellee. As to sentences adjudged prior to 31 May 1951, the rule was different. See Section 6 c (1) (a), AR 633-30. The cases cited by Appellant at pages 6-7 of his brief all relate to sentences adjudged prior to May 31, 1951, are therefore distinguishable and inapplicable.

Appellant has not rebutted the presumption of validity of these regulations and its provisions and has not indicated where they are "plainly and palpably inconsistent with law." Hence, Appellee's good conduct time must be determined under the provisions of AR 633-30.

II. Appellee's Good Conduct Time Should be Computed at the Rate of 14.8 days for Each Month of Confinement as AR 633-30 Provides.

The District Court not only correctly held that Appellee's good conduct time credit should be computed under applicable Army Regulations No. 633-30, but that the rate referred to in Section 16 of AR 633-30, pp. 25-26, should apply. In Appellee's case, based on the length of his sentence, this rate is 14.8 days per month "on time spent in confinement."

Based on said rate, Appellee's sentence had been fully served at the time Appellee filed his petition below. See Appellee's computations set forth in his petition filed below.

Appellant contends that only the rate specified in Section 15 of AR 633-30 (the rate applicable to Appellee therein being 10 days per month of sentence) can be applied to determine the amount of good time which can be credited to Appellee. Appellant takes the further position that the greater rate specified in section 16 can apply only in determining forfeitures of good time credited (i.e. to assure that no more good time is forfeited than a prisoner has earned at the time the penalty is imposed) and that relying on the greater rate specified in section 16 in effect permits a prisoner to earn good time if he serves beyond the minimum or earliest possible release date.

Of the two rates specified, the first is a prospective crediting of good time based on the sentence imposed. By the application of this rate it is possible to ascertain at the outset the minimum release date of a prisoner. The second rate, as specified in section 16 of AR 633-30 and which was the rate applied by the late Judge Goodman below, is described in the Regulations as follows:

> "16. Crediting good conduct time earned in confinement. To determine the amount of good conduct time a prisoner earned on time spent in confinement under a sentence adjudged on or after 31 May 1951, the following rates are applicable:
> . . .
>
> "e. For each month spent in confinement, 14.8 days if the sentence, other than for life, is 10 years or more."

Thus, it is at once obvious that the first rate is prospectively applicable, measured by the length of sentence, whereas the second rate is based on actual performance, that is, on time spent in actual confinement. Where no forfeiture of good time is involved, there is no conflict between the rates. As appellant points out in his brief at pp. 14-16, the crux of the matter is, in the case where a prisoner has forfeited time and thus must serve beyond the minimum release date computed by the first rate in accordance with the length of sentence imposed, whether he can earn good time for the additional time spent in confinement during the period resulting from forfeiture of good time prospectively credited to him.

Appellant seems to feel that there is something unfair and unsound in this result and that it is different from rates applicable to other prisoners.

As to the latter point the answer is that Appellee is confined under sentences imposed by United States Army Courts-Martial and he is therefore governed by such regulations as the proper authorities have adopted to govern an Army prisoner. He was not convicted by a civilian court for a civilian crime but by a military tribunal for a military offense under the special procedures adopted for military personnel and specifically in his case, for

Army personnel. That there might be differences in the manner of ascertaining his guilt or innocence, in meting out punishment for the crime involved and in the serving of the sentence imposed would certainly not be unanticipated or unexpected. It is true that while in a non-military penal institution, he must be "subject to the same discipline and treatment as" other prisoners. 10 U. S. C. § 858. But we are discussing the quantum of sentence to be served, which is still reserved to military regulation.

Therefore the appeal to uniformity in measuring good conduct time is specious and is not a sound basis upon which to reject the application of the clear language of Section 16 of AR 633-30.

As quoted hereinabove, section 16 expressly provides that the rate specified therein applies to time actually served. It does not limit this to time served prior to the minimum release date. It does not limit it to time served while behaving properly. Instead it expressly provides that it applies "for each month spent in confinement" and is to be used "to determine the amount of good conduct time a prisoner earned on time spent in confinement."

It is true that the rate specified in section 16 can be and is used to measure the maximum amount of good conduct time earned at the time of imposition of a forfeiture. This is a necessary requirement in order to avoid forfeiting more good time than a prisoner has earned. See Section 7 a (2), AR 633-30. But that is not its exclusive use.

Appellant, by concerning himself with computing the minimum release date on the basis of the sentence imposed, has relegated to the rate specified in section 16 the sole function of determining the amount of time that can be forfeited. He then argues that if the rate specified in section 16 is used for any other purpose, this renders the rate specified in section 15 meaningless. There are two answers to this question. At page 26, AR 633-30, subparagraph f of section 16 reads as follows:

> "f. If the computation of the total amount of good conduct time earned results in a fraction of a day, the fraction will be disregarded when such computation is to determine the maximum amount of good conduct time which can be forfeited. If the computation of the total amount of good conduct time earned is for purposes other than forfeiture, the fraction of a day will be increased to the next whole number of days." [Emphasis added.]

Thus the very regulation that has been applied recognizes that the rate specified in section 16 can be

applied for purposes other than forfeiture. Indeed it provides that in cases other than forfeiture the prisoner is to be given the benefit of rounding off fractions to the next highest full number. This could only have meaning in connection with crediting good time earned based on actual confinement.

To the extent that there might be any ambiguity as to which rate is applicable, it should be resolved in favor of the liberty of the prisoner. However, the regulations involved are clear that good time can be earned during all of the time a prisoner is confined even though he forfeited good time previously earned. There is nothing "unfair" in this but in fact it is more equitable than to deprive him not only of good time earned, but also of the right to earn additional good time during the additional time spent in confinement.

Where good time is withheld, as distinguished from forfeited, no good time is earned during that period. There is some confusion in the record as to whether the withholding of good time was intended to be of all good time that could have been earned during the particular month the penalty was imposed or whether there was only a partial withholding. It appears that only 10 days were ordered to be withheld during each of the 11 months

involved. However, Appellee could earn 14.8 days per month, leaving 4.8 days of good time not withheld or forfeited. Thus it appears that Appellee should have been released 11 x 4.8 or 52.8 days sooner than he claimed.

In any event, the decision is correct under either view, the only difference being how much additional time Appellee has served beyond the date on which he should have been released, which remains a relevant consideration in view of his conditional release.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the court below be affirmed and that Appellee be considered as having been released on March 16, 1961, or in any event on May 8, 1961.

Respectfully submitted,

DARIO DE BENEDICTIS
Attorney for Appellee